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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 516

JOHN ROSSELLI,

Petitioner,

vs.

JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

ALBERT B. KOORIE,
Counsel for Petitioner.

DAVID GERTLER,
ROBERT S. LINK, JR.,
Of Counsel.

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JOSEPH W. SANFORD, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, John Rosselli, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered May 16, 1946 (R. 38)), affirming a judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered November 27, 1945 (R. 30), discharging a writ of habeas corpus and remanding petitioner to the custody of respondent.

Opinions Below

The opinion of the Circuit Court of Appeals (R. 36-38) is reported at 155 F. (2d) 427. The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division (R. 28-30), is not reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 16, 1946 (R. 38). The petition for rehearing was denied June 18, 1946 (R. 51). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 18, 1925 (28 U. S. C. 347). See also Rule 38 of this Court, 28 U. S. C., following Sec. 354, and Rule 11 of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Statutes Involved

TITLE 18, U. S. C. SECTION 420a.

INTERFERENCE WITH TRADE AND COMMERCE BY VIOLENCE, THREATS, ETC.: PENALTIES.

Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both. (June 18, 1934, c. 569, § 2, 48 Stat. 979.)

TITLE 18, U. S. C. SECTION 582.

OFFENSES NOT CAPITAL. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed. (As amended Dec. 27, 1927, c. 6, 45 Stat. 51.)

Questions Presented

I. Petitioner and seven other defendants, indicted for conspiring to interfere with trade and commerce in violation of 18 U. S. C. 420a (R. 7-10), pleaded in bar of the action that the indictment was not found within three years next after the commission of the offense (R. 11). To this plea the government demurred (R. 13). The Court sustained the demurrer (R. 15-18). Petitioner was thereafter tried for said offense, convicted and sentenced to ten years (R. 6-7). May not petitioner now obtain release by writ of habeas corpus on the ground that the record affirmatively shows that prosecution of the offense was barred by the statute of limitations and that the judgment of conviction is void for want of jurisdiction of the trial court to render it?

II. Does not the present indictment show on its face that it was not found within three years next after the commission of the offense, since it charges formation of the unlaw-

ful agreement on June 18, 1934, and fails to charge the doing of any overt act by any conspirator in furtherance of said agreement within three years prior to the return of the indictment on March 18, 1943?

III. Was not petitioner's plea of the statute of limitations in bar of the action well taken, since the indictment shows on its face that it was not found within three years next after the commission of the offense, and did not the demurrer filed by the government simply question the legal sufficiency of petitioner's plea and raise no fact issue?

Statement of the Case

On March 18, 1943, an indictment was returned in the United States District Court for the Southern District of New York, consisting of one count and charging "that heretofore, to-wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the date of the filing of this indictment," petitioner together with certain other named defendants and confederates conspired to interfere with trade and commerce in violation of 18 U. S. C. 420a (a), (b), and (d), commonly known as the Anti-Racketeering Act. The indictment does not charge the doing of any overt act by any conspirator in furtherance of the conspiracy (R. 7-10).

Each of the defendants having been granted permission to withdraw his plea of "not guilty," pleaded in bar of the action that the indictment was not found within three years next after the commission of the offense (R. 11, 19-21). To this plea the United States demurred (R. 13-14). The Trial Court in a written opinion (R. 17-18) sustained the demurrer. Thereafter petitioner was tried for said offense, convicted and sentenced to ten years and fined $10,000 (R. 6-7).

Petitioner and the other defendants appealed to the United States Circuit Court of Appeals for the Second Circuit which court affirmed the judgment of conviction. *United States* v. *Compagna,* 146 F. (2d) 524; cer. denied, 324 U. S. 867. The question whether the Trial Court erred in sustaining the government's demurrer to petitioner's plea of the statute of limitations in bar of the action was not raised before nor passed upon by the Circuit Court of Appeals.

Thereafter petitioner, imprisoned under said judgment of conviction in the United States Penitentiary at Atlanta, Georgia, filed with the United States District Court for the Northern District of Georgia, Atlanta Division, a petition for a writ of habeas corpus upon the ground that the record affirmatively showed that prosecution of the offense for which he was tried was barred by the statute of limitations and that the judgment of conviction under which he is imprisoned is void for want of jurisdiction of the trial court to render it (R. 2-21). The writ was issued (R. 21) and a response filed (R. 22-27).

After a hearing thereon in which no evidence was introduced, the court in a written opinion (R. 28-30) discharged the writ and remanded petitioner to the custody of respondent. On appeal to the Circuit Court of Appeals for the Fifth Circuit, this judgment was affirmed (R. 38).

It is to be noted that three different courts have passed upon the question whether petitioner's plea of the statute of limitations in bar of the action was well taken.

The Trial Court (R. 17-18) held that since the indictment charged a conspiracy "on the common-law footing" it was not necessary to allege the commission of an overt act within the statutory period to exclude the application of the statute of limitations and that the defense of the statute of limitations could not be raised by a plea in bar. The District Court in discharging the writ herein (R. 28-30)

held that "The indictment challenged in this case charges a continuing conspiracy alleging that it continued 'to and including the date of the filing of this indictment,'" that there was nothing on the face of the record to show that the conspiracy terminated more than three years prior to the filing of the indictment, and that petitioner's plea of the statute raised an issue of fact. The Circuit Court of Appeals (R. 36-38) held that the indictment alleged overt acts as occurring during the period from the formation of the conspiracy on June 18, 1934, to the date of the filing of the indictment but "no overt act was alleged by date,"[1] and that petitioner's plea of the statute of limitations therefore raised an issue of fact.

The three courts, differing widely in reasoning, are in accord upon one proposition, namely, that petitioner's plea of the statute in bar of the action raised an issue of fact. In so holding they are clearly in error.

Neither petitioner's plea of the statute nor the demurrer filed by the government raised any fact issue. Since the present indictment shows on its face that it was not found within three years next after the commission of the offense as provided by 18 U. S. C. 582, petitioner's plea of the

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[1] The Circuit Court's finding of fact that the indictment charged overt acts but not by date is not in conformity with but directly contrary to the allegations of the indictment. See Petition for Rehearing filed in the Circuit Court of Appeals (R. 39-50) in which each and every averment of the indictment is set forth and analyzed. This analysis shows that nowhere in the indictment is there alleged the doing of any act by any conspirator other than the "act of conspiring." Nowhere therein is there set forth the doing of any overt act by any of the conspirators in furtherance of the conspiracy. This finding of fact is directly contrary to any contention made by the government. The government in its brief filed in the United States District Court for the Northern District of Georgia (p. 2) states, "The indictment above referred to does not allege any overt acts," and in its brief filed in the Circuit Court (p. 3) "no overt act was alleged within three years prior to the return of the indictment."

statute, confessing and avoiding all that the indictment averred, was good and raised no issue of fact.

Moreover, the demurrer filed by the government simply tested the legal sufficiency of petitioner's plea and raised no fact issue.

Reasons for Granting Writ

I. The case presents an important question as to the scope of review by writ of habeas corpus which has not been, but should be, settled by this Court.

While the writ of habeas corpus may not be used as a writ of error to review errors of law and irregularities, nevertheless, it is always available "where the judgment of conviction is void for want of jurisdiction of the trial court to render it." *Whaley* v. *Johnston,* 316 U. S. 101, 104. "The scope of review on habeas corpus is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged (citing cases). But if it be found that the court has no jurisdiction to try the petitioner • • • the remedy of habeas corpus is available." *Bowen* v. *Johnston,* 306 U. S. 19, 23.

There is but one solitary exception to this rule and that is in a case where jurisdiction depends on a question of fact which has been determined by the trial court. Then the question of jurisdiction has been judicially determined and the judgment record is conclusive until set aside on direct appeal.

In *Bowen* v. *Johnston, supra,* 306 U. S. 19, this Court held that since there were no disputed questions of fact, it was the province of the habeas corpus court to examine the record to determine whether the trial court had jurisdiction of the place where the crime was committed and to issue the writ in case it found that the court was without jurisdiction.

And so in the present case, since there were no disputed questions of fact, it was the duty of the habeas corpus court to examine the record to determine whether prosecution of the offense was barred by the statute of limitations and the judgment of conviction void for want of jurisdiction of the court to render it, and to issue the writ in case it so found.

II. The court below has decided the case in a way probably in conflict with the decisions of this Court in *Hans Neilsen, Petitioner,* 131 U. S. 176, and *In re Snow,* 120 U. S. 260.

In the *Neilsen* case and also in the *Snow* case the petitioner pleaded in bar of the action that he was being tried twice for the same offense. To this plea the United States demurred. The court sustained the demurrer and thereafter the petitioner was tried for said offense, convicted and sentenced. On appeal from an order denying a petition for a writ of habeas corpus, this Court held that despite the action of the trial court in improperly sustaining the demurrer, the record, that is, the indictment, plea in bar, and demurrer thereto, affirmatively showed the double conviction for the same offense, that the judgment of conviction was void for want of jurisdiction of the trial court to render it and that the petitioner, imprisoned thereunder, could secure his release by habeas corpus.

The present case is "on all fours" with the *Neilsen* and *Snow* cases except that the plea in bar in those cases was former conviction while the plea in bar in the present case is the statute of limitations. It is settled law that the plea of the statute of limitations and of former jeopardy in criminal actions are clearly analogous and governed by the same principles of law. *In re Johnson,* 117 Kan. 136.

Since it appears on the face of the present record, that is, in the indictment, plea in bar, and demurrer thereto, that the offense was barred by the statute of limitations and the judgment of conviction void for want of jurisdiction of the

trial court to render it, petitioner, imprisoned thereunder, is entitled to be released on habeas corpus.

III. The lower court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It is earnestly submitted that the opinion of the Circuit Court of Appeals does not present a serious consideration of petitioner's cause. The opinion misstates petitioner's position, misconstrues the indictment, fails to give proper legal effect to petitioner's plea of the statute of limitations in bar of the action and the government's demurrer thereto, and bases its judgment of affirmance on a finding of fact not in conformity with but directly contrary to the allegations of the indictment. The opinion is not even "cursorily accurate"; it is "simply wrong."

BRIEF IN SUPPORT OF THE PETITION

Facts

Petitioner relies upon the facts as set out in the petition.

ARGUMENT

I

The present record affirmatively shows that the offense for which petitioner was tried was barred by the statute of limitations and that the judgment of conviction under which he is imprisoned is void for want of jurisdiction of the trial court to render it.

Mr. Justice Bradley in *Hans Nielsen, Petitioner,* 131 U. S. 176, 183, defines what is meant by the "record" in the following language:

> "It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the *face* of the judgment; but if it appears in the indictment, or anywhere else in the record, (of which the judgment is only a part) it is sufficient. In the present case it appeared on the record in the plea of autre fois convict, which was admitted to be true by the demurrer of the Government. We think that this is sufficient."

And so in the present case it appears on the face of the record, that is, in the indictment, plea in bar, and the demurrer thereto, that the offense for which petitioner was tried was barred by the statute of limitations and that the trial court was without jurisdiction to pass judgment thereon.

A. *The present indictment shows on its face that it was not found within three years next after the commission of the offense.*

The present indictment, returned March 18, 1943, consists of one count and charges "that heretofore, to-wit, on or about the 18th day of June, 1934, and continuously thereafter to and including the date of the filing of this indictment," the defendants and their confederates conspired in violation of the Anti-Racketeering Act. The indictment does not charge the doing of any overt act by any conspirator in furtherance of the conspiracy.

Conspiracies under the Anti-Racketeering Act, like those in violation of the Sherman Act, are "on the common-law footing," that is, not dependent on "the doing of any act other than the act of conspiring as a condition of liability." *Nash* v. *United States,* 229 U. S. 373, 378. The offense, although complete when the unlawful agreement is formed, may be continued beyond the moment of making the unlawful agreement by the doing of overt acts by any of the conspirators in furtherance of its object, in which case the conspiracy is a continuing one. *United States* v. *Kissell,* 218 U. S. 601, 607.

"A conspiracy is a continuing one so long as overt acts are committed in furtherance thereof. United States *v.* Kissell, 218 U. S. 601." *Stanley* v. *United States,* 195 Fed. 896, 903. Overt acts supply "the 'continuous cooperation' necessary to keep the conspiracy alive. United States *v.* Kissell, 218 U. S. 601, 607." *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 252.

While it is not essential to an indictment for conspiracy "on the common-law footing" that the commission of an overt act in furtherance of such conspiracy be alleged to complete the offense, nevertheless, the commission of such an act and its allegation in such an indictment is necessary

to continue the offense beyond the moment of making the unlawful agreement or conspiracy. *United States* v. *Kissell, supra,* 218 U. S. 601, 607.

At common law there was no rule limiting the time within which a criminal prosecution must be commenced. However, Title 18, U. S. C., Section 582, provides that "no person shall be prosecuted, tried or punished for any offense not capital * * * unless the indictment is found, * * * within three years next after such offense shall have been committed."

Where an indictment charges a conspiracy "on the common-law footing" and does not allege the doing of any overt acts in furtherance of its object, the period of limitation must be computed from the date of the formation of the unlawful agreement, as the offense is complete at that time.

However, since a continuing conspiracy continues, so far as the statute of limitations is concerned, so long as any overt acts are done by any of the conspirators in furtherance of the conspiracy, the period of limitation must be computed from the date of the last overt act set forth in the indictment. *United States* v. *Kissell, supra,* 218 U. S. 601, 607; *Brown* v. *Elliott,* 225 U. S. 392, 401.

There can be no valid basis for a charge of conspiracy formed prior to the statutory period, unless an overt act be done to effect the object thereof within the running of said statutory period, and such overt act must be alleged in the indictment. This is true whether the charge be a conspiracy "on the common-law footing," *United States* v. *Kissell, supra,* 218 U. S. 601, 607; *United States* v. *Great Western Sugar Company,* 39 F. (2d) 152; *United States* v. *Pacific and A. R. and Navigation Company,* 4 Alaska 574; or one in violation of Section 37 of the Criminal Code (18 U. S. C. 88). *Brown* v. *Elliott, supra,* 225 U. S. 392, 401; *Pinkerton* v. *United States,* 145 F. (2d) 252, 254; *Shaw* v.

United States, 41 F. (2d) 26, 27; *Culp* v. *United States*, 131 F. (2d) 93, 100; *Stager* v. *United States*, 233 Fed. 510, 511; *Myer* v. *United States*, 220 Fed. 800, 803; *Houston* v. *United States*, 217 Fed. 852, 859; *Lonabaugh* v. *United States*, 179 Fed. 476.

The present indictment, returned March 18, 1943, charges formation of the unlawful agreement or conspiracy on June 18, 1934, and since it does not charge the doing of any act by any of the conspirators in furtherance of the agreement to continue the offense beyond the moment of making the unlawful agreement, the offense was complete on that date, and from that date also, the statute of limitations began to run against the prosecution therefor, barring same on June 19, 1937.

While the indictment alleges that the conspirators continued to conspire from the date of the unlawful agreement on June 18, 1934, to the date of the filing of the indictment on March 18, 1943, it fails to allege the doing of any act by any conspirator in furtherance of said agreement within the three-year period to exclude the application of the statute of limitations. The unlawful agreement formed on June 18, 1934, although in existence on March 18, 1943, was not subject to prosecution on that date, as more than three years had elapsed since it was a completed offense.

The present indictment therefore shows on its face that it was not found within three years next after the commission of the offense.

B. *Petitioner's plea of the statute of limitations in bar of the action, confessing and avoiding all that the indictment avers, was well taken and raised no issue of fact. The demurrer filed by the government simply questioned the legal sufficiency of petitioner's plea and raised no issue of fact.*

In most jurisdictions the present indictment would be fatally defective as it shows on its face that it was returned

after the running of the statute of limitations. However, in the federal courts the bar of the statute is a matter of defense. *Capone* v. *Aderhold,* 65 F. (2d) 130.

It is settled law that the bar of the statute may be raised by a plea in bar prior to trial, *United States* v. *Cook,* 17 Wall. 168; *Adams* v. *Wood,* 2 Cranch 336; *United States* v. *Norton,* 91 U. S. 566; *United States* v. *Scharton,* 285 U. S. 518; *United States* v. *Novek,* 271 U. S. 201; *United States* v. *McElvain,* 272 U. S. 633; and that such a plea is good where it confesses and avoids all that the indictment avers. *United States* v. *Kissell, supra,* 218 U. S. 601, 607.

The record affirmatively shows that petitioner raised the bar of the statute of limitations by filing a plea in bar prior to trial. Since the indictment shows on its face that it was not found within three years next after the commission of the offense, petitioner's plea of the statute, confessing and avoiding all that the indictment averred, was well taken and raised no issue of fact.

Petitioner's plea in bar raised an issue and afforded the government an opportunity to meet it. *Capone* v. *Aderhold, supra,* 65 F. (2d) 130.

The government met this issue by demurring to the plea. The demurrer simply questioned the legal sufficiency of petitioner's plea, *Adams* v. *Wood, supra,* 2 Cranch 336; *United States* v. *Norton, supra,* 91 U. S. 566, and raised no fact issue.

While the government is not bound to prove the exact date charged in the indictment, that date will be accepted on the question of limitation unless evidence is introduced to vary it. *Brouse* v. *United States,* 68 F. (2d) 294.

The demurrer filed by the government shows that no evidence was introduced to vary June 18, 1934, as the date of the commission of the offense or to prove petitioner "a fugitive from justice" within the purview of 18 U. S. C.

583, and that no question of fact was passed upon or judicially determined by the District Court for the Southern District of New York in sustaining the demurrer.

Since petitioner's plea in bar was well taken, this plea, demurred to by the government, should have been sustained. *Adams* v. *Wood, supra,* 2 Cranch 336; *United States* v. *Norton, supra,* 91 U. S. 566; *United States* v. *McElvain, supra,* 272 U. S. 633; *United States* v. *Scharton, supra,* 282 U. S. 518; *United States* v. *Novek, supra,* 271 U. S. 201.

Despite the action of the trial court in sustaining the demurrer and in assuming jurisdiction, it appears on the face of the record, that is, in the indictment, plea in bar and demurrer thereto, that petitioner was tried for and convicted of an offense, prosecution of which was barred by the statute of limitations.

C. *The trial court was without jurisdiction to try or pass judgment upon petitioner for an offense, prosecution of which was barred by the statute of limitations.*

Unlike a statute of limitations in a civil case, a statute of limitations in a criminal case creates a bar to prosecution.

As said by the Court in *Taylor* v. *O'Grady,* 113 F. (2d) 789:

> "Clearly, if the three-year statute of limitations was applicable the action was barred, and the court was without power to try petitioner for the crime committed or to impose sentence upon him nine years after the event."

As to the nature of the statute of limitations in criminal cases, Wharton in his work on Criminal Procedure (1 Wharton Cr. Pr. Sec. 367) states:

> "In criminal cases the state is the grantor, surrendering by act of grace its right to prosecute and

declaring the offense to be no longer the subject of prosecution."

As said by the Court in *People* v. *McGee*, 1 Cal. (2d) 611:

> "In criminal cases, the state, through its legislature has declared that it will not prosecute crimes after the period has run, and hence has limited the power of the courts to proceed in the matter."

In *State* v. *Rudner*, 92 N. J. L. 20, 25, the Court said:

> "The offense was outlawed at the time the indictment was presented and, consequently, the cerdict is without force. * * * In this situation, the trial court was without legal power to pass sentence upon the plaintiff in error."

In *State* v. *Pevin*, 92 N. J. L. R. 553, the Court said:

> "The prosecution for the misdemeanor was barred by the statute of limitations; no judgment could be pronounced on that account."

Likewise, the Supreme Court of Louisiana, in the case of *State* v. *Bischoff*, 146 La. Rep. 747, 768, said:

> "Of course, the question of when the charge was found does not pertain to the guilt or innocence of the accused, but it does affect very vitally the issue of whether or not he is guilty of a crime of which he can be tried, convicted or punished. In other words, the Jury are powerless to try, and the Judge is without power to punish, unless the indictment or presentment for the same be found or exhibited within one year next after the offense shall have been made known to a public officer having the power to direct a public prosecution."

The above cases establish that where the record affirmatively shows that the period of limitation has run, the power of the court to proceed further is gone. A judgment forbidden by statute is void. A judgment barred by the

statute of limitations is a judgment forbidden by statute and therefore void. As said by the court in *People ex rel. Tweed* v. *Lipscomb*, 60 N. Y. 559, 591:

> "No court is or can be competent to pronounce a sentence and give judgment in open and palpable violation of a positive statute, and a judgment thus given is simply void."

One cannot conceive of a statute more positive than the command of Congress that "no person shall be prosecuted, tried, or punished for any offense," unless the indictment is found within the prescribed time. The command is clear, unconditional and conclusive. As Chief Justice Marshall observed in *Adams* v. *Wood*, 2 Cranch 336, 342, "not even treason can be prosecuted after a lapse of three years."

Since the record affirmatively shows that the offense for which petitioner was tried was barred by the statute of limitations, it follows that the trial court was without jurisdiction to pass judgment thereon.

II

Petitioner, imprisoned under a judgment of conviction void for want of jurisdiction of the trial court to render it, is entitled to be discharged from custody on habeas corpus.

The district court, in discharging the writ herein, held that since the trial court had jurisdiction over the offense and over appellant, it had jurisdiction to determine the question raised by the demurrer to the plea in bar, and that an incorrect judgment, though erroneous, was not void and could not be reviewed on habeas corpus.

However, there are certain exceptions to the rule requiring resort to appellate procedure instead of to habeas corpus of a review of a determination by a court of its own

jurisdiction in a criminal prosecution, which have more than once been acted upon by this Court.

While it is established law that the writ of habeas corpus cannot be used as a writ of error to review errors of law and irregularities not depriving the Court of jurisdiction, it is equally well established that nevertheless where the record affirmatively shows that the Court was without jurisdiction to try or sentence petitioner the judgment is void, and one imprisoned under and by virtue of it may be discharged on habeas corpus.

As said by this Court in *Bowen* v. *Johnston,* 306 U. S. 19, 26:

> "But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner has assumed jurisdiction necessarily deprives another court of authority to grant a writ of habeas corpus. * * * Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record (See In re Snow, 120 U. S. 274, 285; Hans Neilsen, Petitioner, 131 U. S. 176, 183), and the remedy of habeas corpus may be needed to release the prisoner from a punishment imposed by a court manifestly without jurisdiction to pass judgment."

The cases of *Hans Neilsen, Petitioner,* 131 U. S. 176, and *In re Snow,* 120 U. S. 260, cited in the *Bowen* case, are absolutely controlling and decisive of the present case.

In the *Neilsen* case two indictments were found against the petitioner in the District Court of Utah, one charging that between the 15th day of October, 1885, and the 13th day of May, 1888, he lived and cohabited with more than one woman, to-wit, Annie Neilsen and Caroline Neilsen. To this indictment, he pleaded guilty, and was sentenced to imprisonment and to pay a fine.

After he had served his sentence and paid his fine the second indictment came on for trial. This indictment

charged that on May 14, 1888, he committed adultery with Caroline Neilsen, a person not his wife. Neilsen entered orally a plea of former conviction, setting forth that the charge of unlawful cohabitation covered the entire period from the 15th day of October, 1885, to the time of the finding of the indictment, September 27, 1888, and that the crimes of unlawful cohabitation and adultery with one and the same person were one and the same offense and not divisible. To this plea the government demurred. The court sustained the demurrer, and petitioner was convicted and sentenced.

He applied to the Court for a writ of habeas corpus, which application was refused, and from that order he appealed to the United States Supreme Court. The government on the appeal contended strenuously that the accused did not show want of jurisdiction in the court below, but only alleged errors of the court in the exercise of its jurisdiction, and that if the judgment of the court in sustaining the demurrer was wrong, it was an error, but the error was one of judgment; that the judgment might be voidable for error, but was not void for want of power, and until reversed by direct appeal was conclusive.

This Court, however, rejected the government's contention, reversed the District Court and ordered the writ granted, stating, p. 182:

> "The objection to the remedy of habeas corpus of course would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason the judgment is void, and may be questioned collaterally, and a de-

fendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus."

The Court added, p. 13:

"It is true that, in the case of Snow, we laid emphasis on the fact that the double conviction for the same offense appeared on the face of the judgment; but if it appears on the indictment, or anywhere else in the record, (of which the judgment is only a part), it is sufficient. In the present case it appeared on the record in the plea of autre fois convict, which was admitted to be true by the demurrer of the government. We think that this is sufficient."

The Court further stated, p. 184:

"A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the case, but where it has no constitutional authority or power to condemn the prisoner. As said by Chief Baron Gilbert, in a passage quoted in Ex parte Parks, 93 U. S. 18, 22, 'If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter which by law no man ought to be punished, the courts are to discharge.' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale Pleas of the Crown, 144. And why should not such a rule prevail in favorem libertatis? If we have seemed to hold the contrary in any case, it has been from inadvertence."

In the case *In re Snow, supra,* 120 U. S. 274, three indictments founded on a statute prohibiting a male from cohabiting with more than one woman were filed at the same time against the defendant in the District Court of Utah. The three indictments were alike in all respects, except that each covered a different period of time. Snow was tried on one of the three indictments, convicted, and sentence was reserved. He was then placed on trial on a second indict-

ment. Snow entered an additional oral plea, setting up his conviction on the first indictment, and alleging that the offenses charged in the two indictments were one and the same and that said offense was continuous and not divisible. The government demurred to the plea the Court sustained the demurrer. Snow was then tried, again convicted, and again sentence was reserveed. Snow was then placed on trial on the third indictment. Snow pleaded orally his two prior convictions in bar of prosecution of the offense charged, the government demurred to the plea, and the Court sustained the demurrer. Snow was again convicted and thereafter sentenced and fined on each of the three indictments.

On appeal to the Supreme Court of the Territory of Utah the judgments of conviction were affirmed. *Snow* v. *United States,* 4 Territory Utah 280. Writs of error to review the determination of the Supreme Court of the Territory of Utah were dismissed by this Court for want of jurisdiction. *Snow* v. *United States*, 118 U. S. 346.

Snow, after he had served the sentence and paid the fine imposed on the first-tried indictment, applied to the district court for a writ of habeas corpus. The application was denied and Snow appealed from this order to this Court.

This Court in its opinion, 120 U. S. 281, set forth the following contention advanced by the government in opposition to granting the writ:

> "It is contended for the United States that, as the Court which tried the indictment had jurisdiction over the offenses charged in them, it had jurisdiction to determine the questions raised by the demurrers to the oral pleas in bar in the cases secondly and thirdly tried; that it tried those questions; that those questions are the same which are raised in the present proceedings; that they cannot be reviewed on habeas corpus by the court; and that they could only be reexamined here on a writ of error, if one were authorized."

It is to be noted that this contention is identical with the reason advanced by the district court as a ground for discharging the writ herein.

This Court, however, rejected the aforesaid contention, reversed the court below, and ordered the writ to be granted, stating:

> "The judgment in the case, taken in connection with the other proceedings in the record and in the statute, shows, within the principle of Crepps *v.* Durden, Cowp. 640, that there was but one entire offense, whether longer or shorter in point of duration, between the earliest day laid in any indictment and the latest day laid in any. There can be but one offense between such earliest day and the end of the continuous time embraced by all of the indictments. Not only had the court which tried them no jurisdiction to inflict a punishment in respect to more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on habeas corpus when the sentence on more than one of the convictions is sought to be enforced. If such an objection could be taken in Crepps *v.* Durden, in a collateral action for damages, it can be taken on a habeas corpus to release the party from imprisonment under the illegal judgment."

The *Neilsen* and *Snow* cases are "on all fours" with the present case. In each case a plea in bar was interposed to the prosecution of the offense charged. A plea in bar has been defined by the court in *Territory* v. *Anderson,* 25 Hawaii 55, as follows:

> "A special plea in bar presents matter outside of the record, which completely bars proceedings and as to which the court may exercise no discretion, but is bound to sustain the plea, if well taken."

In the *Snow* and *Neilsen* cases the plea in bar was autre fois convict. In the present case the plea in bar was the statute of limitations. "The pleas of the statute of limitations and of former jeopardy in criminal actions are clearly analogous and are governed by the same principles of law." *In re Johnson*, 117 Kansas 136. In each case the plea in bar was "well taken." In each case the government demurred to the plea in bar, thus simply questioning its legal sufficiency. In each case the court sustained the demurrer. In each case the court was wrong in so doing. In each case the court's error was apparent on the face of the record.

In the *Neilsen* and *Snow* cases this Court held that, since petitioner's plea in bar of autre fois convict was "well taken" and properly raised and the government demurred thereto, it appeared on the face of the record that petitioner was twice convicted for the same offense. And so in the present case, since petitioner's plea is bar of the statute of limitations was "well taken" and properly raised and the government demurred thereto, it appears on the face of the record that petitioner was convicted of an offense barred by the statute of limitations.

In the *Neilsen* and *Snow* cases this Court held that the act of the trial court in continuing the trial and sentencing the petitioner in violation of the bar of autre fois convict was beyond its jurisdiction and void. And so in the present case the act of the trial court in continuing the trial and in sentencing petitioner in violation of a bar under the statute of limitations was beyond its jurisdiction and void.

Since the record affirmatively shows that the offense for which petitioner was tried was barred by the statute of limitations, the judgment of conviction pronounced by the trial court was without jurisdiction and void and petitioner, imprisoned thereunder, may obtain release by habeas corpus.

Conclusion

For the reasons above stated, it is submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

ALBERT B. KOORIE,
Attorney for Petitioner.

DAVID GERTLER,
ROBERT S. LINK, JR.,
Of Counsel.

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